Supreme Court, U.S.
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No. 99-1896

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court of Appeals for the Ninth Circuit

---

MOTION TO FILE IN FORMA PAUPERIS AND DECLARATION THEREOF

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51 pp

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

The Petitioner, Shomari Naaem Shuaibe, respectfully requests leave to proceed in forma pauperis. Petitioner is an inmate incarcerated at California State Prison-Los Angeles County (CSP-LAC) and serving a sentence of life without possibility of parole. On May 22, 1995, Petitioner was granted leave to proceed in forma pauperis by the United States District Court for the Central District of California.

Dated: July 23, 2000

Respectfully submitted,

Catherine J. Swysen

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Counsel for Respondent

DECLARATION OF COUNSEL

I, Catherine J. Swysen, declare:

1. I am the attorney of record for Respondent herein.

2. I am informed and believe that Respondent qualifies to proceed in forma pauperis.

3. I am aware of the Rule 39.1 requirement that the party's notarized affidavit or declaration in the form prescribed by the Federal Rules of Appellate Procedure, Form 4 including a statement certified by the appropriate institutional officer showing all receipts, expenditures and balances during the last six months in the inmate's institutional account be filed in connection with a motion to proceed in forma pauperis.

4. I have sent the required declaration to Respondent on June 22, 2000 but have not received it back yet. I am informed and believe that Respondent has not been able to obtain yet the statement showing the activity in his trust account for the past sixth months. The declaration will be filed as soon as it is received. In the meantime, Respondent respectfully requests that the Court allow him to proceed in forma pauperis for the purpose of filing this opposition.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 23, 2000.

Catherine J. Swysen

Catherine J. Swysen

No. 99-1896

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SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

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BRIEF IN OPPOSITION

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No. 99-1896

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

INTRODUCTION

Respondent, a state prisoner, was convicted of murder and sentenced to state prison under the name of Felton Lee Guillory (the "committed name".) In March 1992, Respondent legally changed his name to Shomari Naeem Shuaibe (the "religious name.)

Respondent has been a prisoner at the California State Prison at Lancaster since September 27, 1993. Since then he has been prevented from conducting his daily affairs in both his religious name and committed name. Respondent filed an Inmate Appeal on March 10, 1994 requesting that he be issued a privilege card and an identification card reflecting his religious name. He also requested that his religious name be reflected in the central file and in the prison computer. His administrative appeals were denied at all levels. The last administrative appeal was denied on

November 18, 1994. On March 21, 1995, Respondent filed a complaint in the United States District Court for the Central District of California alleging a violation of his civil rights under the First Amendment and the California Constitution.

Both Petitioners and Respondent filed motions for summary judgment in the district court which were granted in part and denied in part.

Petitioners took an interlocutory appeal to the Ninth Circuit Court of Appeals from the denial of qualified immunity on the narrow ground that they were entitled to qualified immunity because they relied on a written prison policy. The Ninth Circuit affirmed the district court decision and denied the Petitioners' petition for rehearing *en banc*.

The case is currently pending in the district court. A pre-trial conference is scheduled on October 2, 2000.

STATEMENT OF JURISDICTION

First, this Court lacks jurisdiction to hear this interlocutory appeal from the denial of qualified immunity because the district court denied immunity on the basis that material facts are in dispute. *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995).

Secondly, Petitioners raise in their Petition questions which were not raised below and, therefore, have been waived.

In their interlocutory appeal to the Ninth Circuit,

Petitioners raised only a narrow issue related to their claim of qualified immunity asking the Ninth Circuit to "hold that state employees relying on published regulations, policies and procedures which they are unable to ignore, change, modify or rescind are entitled to qualified immunity in section 1983 action charging them with violation of federal rights because of their reliance of these regulations, policies and procedures" (Resp. Appendix, 33):

> "This case presents a question of first impression in this circuit regarding the defense of qualified immunity for state employees who are required to follow and do follow published regulations, policies and procedures. In the case at bench, the state employee defendants followed published regulations in reviewing and deciding whether to grant or deny an inmate grievance. *The issue presented is whether the state employee defendants are entitled to summary judgment on the grounds of qualified immunity in an inmate civil rights action pursuant to 42 U.S.C. § 1983 when the inmate grievance was denied on the basis of published regulations, policies and procedures which they are unable to ignore, amend, change, modify, or rescind and/or upon which they reasonably relied."* Resp. Appendix, 19-20. [emphasis added.]

Petitioners failed to raise before the Ninth Circuit Court of Appeal the issue of whether *Turner V. Safley*, 482 U.S. 78 (1987) requires prison officials to change or replace record-keeping practices (question 2) and the issue of whether the Ninth Circuit's alleged misapplication of *Turner* affects the precedential value of its opinions on inmates' legal religious name changes and calls into question their continued validity (question 3).

Accordingly, these issues have been waived by petitioners.

Thirdly, Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for writ of certiorari only for compelling reasons. Petitioners attempt to satisfy Rule 10 by contending that there is an inter-circuit conflict on the issue of qualified immunity. There is no such conflict. The district court in this case, as well as the courts in the cases cited by Petitioners in support of their contention, followed this Court's precedents in analyzing Petitioners' claim of qualified immunity.

Fourthly, Rule 10 also provides that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or a misapplication of a properly stated rule of law." The district court in this case properly analyzed Petitioners' claim of qualified immunity pursuant to the standard set forth by this Court and found that there was a material issue of fact preventing the entry of summary judgment on that issue. The Ninth Circuit Court of Appeals affirmed.

There is no compelling reasons for this Court to grant the petition for writ of certiorari.

STATEMENT OF THE CASE

In their motion for summary judgment, Petitioners argued that they should be entitled to qualified immunity under the rule set forth in *Harlow v. Fitzgerald*, 457 U.S. 396 (1982). They argued

that Respondent wanted to use his religious name exclusively on all prison documents and records as well as correspondence and that there was no clearly established right to do so under *Malik I, Malik II,* and Malik III.[1]

They argued also that assuming that Respondent was requesting that he be allowed to use both names, they would still be entitled to qualified immunity because the right to do so was not clearly established enough to alert a reasonable official to its parameters and a reasonable officer, following the prison regulation, would have believed that the particular conduct at issue to be lawful. Resp. Appendix 37-43.

The district court following the rule set forth in *Harlow v. Fitzgerald* found that the law was "'clearly established, in 1994 when the alleged events in this action occurred, that prison officials could not constitutionally deny an inmate the right to use his religious, legal name, in addition to his committed name, in order to obtain prison services or benefits." Pet. Appendix, 38a. It also found that it would have been unreasonable for Petitioners to deny him the right to obtain services and privileges in both names. Pet. Appendix, 37a. Finally, the district court held that the existence of a genuine issue of fact as to the nature

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[1]*Malik v. Brown,* 16 F.3d 330 (9th Cir. 1994) (*Malik I*), mandate recalled and opinion supplemented, 65 F.3d 148 (9th Cir. 1995) (*Malik II*), and *Malik v. Brown,* 71 F.3d 724 (9th Cir. 1995) (*Malik III*)

of Respondent's claim precluded the application of the doctrine of qualified immunity. Pet. Appendix, 36a.

In their interlocutory appeal to the Ninth Circuit, Petitioners did not challenge the holding by the district court that the law was clearly established in 1994 that an inmate had a constitutional right to use both his religious name and his committed name in conducting his daily affairs. They did not challenge the holding in *Malik*. They argued only that they were entitled to qualified immunity as a matter of law solely because they relied on a written prison policy.

Petitioners had opposed Respondent's request for injunctive relief on the ground, among others, that Respondent had not demonstrated that his constitutional rights had been violated.

The district court held that Respondent was entitled to the prospective relief of using his legal, religious name in addition to his committed name. The district court did not decide the appropriate scope of a permanent injunction since this issue had not been raised or briefed. The appropriate scope of a permanent injunction was left for a subsequent motion.[2] Pet. Appendix, 38a and 43a.

Petitioners did not challenge this holding.

In its ruling, the district court found that Petitioners had not offered "evidence of any legitimate penological reason why the

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[2]This motion has not been filed yet.

plaintiff should not be allowed to use his religious name as well as his committed name", nor any evidence that "changing their records to reflect the plaintiff's legal, religious name would 'wreak havoc'. . ." since that contention was "based upon a one-page 'fact sheet' ... which is inadmissible ...". Pet. Appendix 39a-40a.

Petitioners sought to introduce new facts on that issue in their objections to the Report and Recommendation through, inter alia, the declaration of Larry Wagner which is attached to their Petition. Pet. Appendix 8a-16a. These facts are restated on pages 12-14 of their Petition.

COMPELLING REASONS DO NOT EXIST TO GRANT A WRIT OF CERTIORARI

1. The District Court Followed the Appropriate Analysis Set Forth by this Court in Harlow V. Fitzgerald[3] in Determining Petitioner's Claim of Qualified Immunity and Properly Denied Qualified Immunity on the Basis That Material Facts Are in Dispute.

This Court has set the standard to analyze and determine claims of qualified immunity in civil rights case in *Harlow v.*

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[3]457 U.S. 396 (1982)

Fitzgerald[4]:

> "We ... hold that government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know. . . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982).

This is the standard that the district court followed in analyzing Petitioners' claim of qualified immunity. The district court held that an inmate constitutional right to use both his religious name and committed name in his daily affairs was clearly established in 1994 in light of *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994) (*Malik I)* which held that an inmate has a right to use

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[4]457 U.S. 800 (1982)

both his committed name and religious name "in his daily affairs" and *Malik v. Brown,* 71 F.3d 724 (9th Cir. 1995) (*Malik III)* which held that an inmate First Amendment right to use his religious name in conjunction with his committed name was clearly established in 1990. The district court also held that it would have been unreasonable for the Petitioners to deny Respondent the right to obtain services in both names. Finally, the District court denied qualified immunity because there was a genuine issue of fact as to the nature of Respondent's claim precluded the application of the doctrine of qualified immunity.

2. Contrary to Petitioners' Contention, There Is No Conflict among the Circuits on the Issue of Qualified Immunity, Therefore, the Petition must Be Denied.

A. No Circuit Has Ever Held That Public Employees Required as a Condition of Employment to Follow Written Policy Which They Did Not Make, May Not Modify and Cannot Ignore Are Entitled to Qualified Immunity as a Matter of Law Even If a Court Later Finds Their Employer's Policy to Be in Error.

No authorities cited by Petitioners stand for the proposition that public employees required as a condition of employment to follow written policy which they did not make, may not modify and cannot ignore are entitled to qualified immunity as a matter of law even if a court later finds their employer's policy to be in error.

Wolfel v. Morris does not stand for the proposition that prison officials relying on published regulations are entitled to qualified immunity as a matter of law but rather stand for the proposition that a prison official relying on a facially valid regulation will be entitled to qualified immunity unless he knows or should have known that the regulation violates a clearly established constitutional right. The plaintiffs inmates in *Wolfel* "were punished by prison officials for circulating a petition aimed at redressing their grievances against the conditions at the Southern Ohio Correctional Facility." The court ruled that the prison regulation used to punish the inmates was unconstitutionally vague. Following the standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), the court held that the defendant were entitled to qualified immunity because a reasonable officer, relying on the regulation, could have believed that the conduct was lawful since they relied on a regulation which had not been found unconstitutional yet and the court could not ". . . say that no reasonable official, even knowing the general requirements of notice and specificity, could have thought that the regulation provided sufficient notice that the prisoners' actions were punishable." *Wolfel v. Morris,* 972 F.2d at 719-720.

Gorra v. Hanson, 880 F.2d 95 (8th Cir. 1989) also follows the standard set forth in *Harlow* to determine the claim of qualified

immunity. The plaintiff in *Gorra* sued troopers alleging that they had arrested him without probable cause for a violation of a statute prohibiting intentionally preventing the apprehension of another. Analyzing the reasonableness of the troopers' conduct in light of the law that was clearly established at the time of the arrest, the court granted qualified immunity because at the time of the arrest the courts had not yet construed the law and because the troopers' interpretation of the statute was not unreasonable. *Gorra v. Hanson*, 880 F.2d at 98.

Following a similar analysis, the court in *Moorman v. Thalacker*, 83 F.3d 970 (6th Cir. 1996), held that the defendants were entitled to qualified immunity stating that "[w]here there is no clearly established interpretation to the contrary, we defer to prison officials' interpretation of their rules to the facts so long as that interpretation and application is not objectively unreasonable." *Moorman v. Thalacker*, 83 F.3d at 974.

In the present case, the district court followed also the *Harlow* standard. The court found that it would have been unreasonable for Petitioners to believe that their conduct - preventing Petitioner from conducting his daily affairs in both his committed name and religious name - was lawful in light of the fact that the law was clearly established in the Ninth Circuit that he had the right to do so.

B. There Is No Conflict Between the Circuits.

Petitioners have not shown any conflict between the circuits on the issue of qualified immunity. The Ninth Circuit as well as the Sixth and Eighth Circuits all analyze claims of qualified immunity pursuant to the standard set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The decision of *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) is not in conflict with cases cited by Petitioners. In *Stroh*, the court analyzed the claim of qualified immunity pursuant to *Harlow*. The court held that the law was clearly established in light of a decision from this Court that liquor regulations could not be used to impose restrictions on speech that would otherwise be prohibited under the First Amendment. The court also held that no reasonable official could have believed the conduct was lawful based on that precedent. *LSO, Ltd. v. Stroh*, 205 F.3d at 1157-1160.

3. The Question of Whether Prisons must Change or Reorganize Their Record Keeping Practices to Accommodate Inmates' Legal Name Changes (Question 2) Is Not Properly Before this Court.

First, this issue was not raised by Petitioners in their interlocutory appeal. Accordingly this question is waived.

Secondly, it is premature for this Court to consider this question based on the record.

The district court held that Respondent is entitled to the

prospective injunctive relief of using his legal, religious name in addition to his committed name. However, the district declined to determine the appropriate scope of injunctive relief since it has neither been briefed or raised. Pet. Appendix, 43a. The scope of injunctive relief still need to be determined by the trial court after both parties have had an opportunity to submit evidence.

Petitioners did not appeal this ruling.

Respondent had requested that the court issue an order directing Petitioners to allow him to use identification and privilege cards bearing both his committed and religious names, to identify him in prison computer records and central file by his committed name and also his religious name whether by "ACA" designation or otherwise and to receive prison services and benefits in his religious and committed names. The district court noted that Petitioner did not claim that the CDC files should be altered so as to reflect his religious name as his principal name rather than an "ACA" and did not request that his committed name be eliminated. Pet. Appendix, 39a-40a. In fact, in this case, the prison regulations themselves requires that a prisoner's legal name change be reflected as an "ACA." Pet. Appendix, 40a.

Since no order has been issued yet requiring Petitioners to change or re-organize their record keeping practices and the record does not support that contention, it is premature for this Court to consider this question.

4. The Question of Whether the Ninth Circuit's Alleged Misapplication of *Turner* Affects the Precedential Value of its Opinions on Inmates' Legal Religious Name Changes and Calls into Question Their Continued Validity (Question 3) Is Not Properly Before this Court.

Petitioners are asking this Court to review the Ninth Circuit decision in *Malik v. Brown,* 16 F.3d 330 (9th Cir. 1994) (*Malik I*), mandate recalled and opinion supplemented, 65 F.3d 148 (9th Cir. 1995) (*Malik II*). This is beyond the scope of this interlocutory appeal. Furthermore, Petitioners waived that issue by failing to raise it below in the Ninth Circuit Court of Appeals.

CONCLUSION

Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1896

In The
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C.A. TERHUNE, et al., Petitioners
v.
SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory, Plaintiff/Appellee, v. JAMES GOMEZ, et al., Defendants/Appellants.	NO. 99-55049 No. CV 96-3395 RAP (Mc) CENTRAL DISTRICT OF CALIFORNIA

DEFENDANTS-APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory,	)	No. 99-55049
Plaintiff/Appellee,	)	No. CV 96-3395 RAP (Mc)
v.	)	CENTRAL DISTRICT OF CALIFORNIA
JAMES GOMEZ, et al.,	)	
Defendants/Appellants	)	

DEFENDANTS-APPELLANTS' BRIEF

* * *

ISSUES PRESENTED

(1) This case presents a question of first impression in this Circuit regarding the affirmative defense of qualified immunity for state employees who are required to follow and do follow published regulations, policies and procedures. In the case at bench, the state employee defendants followed published regulations in reviewing and deciding whether to grant or deny an inmate grievance. The issue presented is whether the state

employee defendants are entitled to summary judgment on the grounds of qualified immunity in an inmate civil rights action pursuant to 42 U.S.C. 1983 when the inmate grievance was denied on the basis of published regulations, policies and procedures which they were unable to ignore, amend, change, modify, or rescind and/or upon which they reasonably relied.

STATEMENT OF THE CASE

A. JURISDICTION

This interlocutory appeal is from the October 16, 1998 order by United States District Court Judge Richard A. Paez of the United States District Court for the Central District of California denying defendants-appellants' motion for reconsideration of the September 4, 1998 order by then United States District Court Judge Kim McLane Wardlaw partially granting and partially denying summary adjudication and denying the parties' cross-motions for summary judgment.

Jurisdiction of the district court arose under 42 U.S.C. 1983 and 28 U.S.C. 1291.

This court has jurisdiction over interlocutory appeals regarding qualified immunity pursuant to 28 U.S.C. 1291. United

States v. Wallace & Tiernan Co., 336 U.S. 793, 794-5, 69 S. Ct. 824, 825-26, fn. 1, 93 L. Ed. 1042 (1949); Baker v. Racansky, 887 F. 2d 183, 185 (9th Cir. 1989).

B. PROCEEDINGS BELOW

The initial complaint was filed on March 21, 1995. (D.C. Dk. 1.) On March 31, 1995, the United States Marshal was ordered to serve all eight defendants in their individual and official capacity. (D.C. Dk. 4.) On December 10, 1996, defendants filed a motion for summary judgment. (D.C. Dk. 50.) Plaintiff also submitted a motion for summary judgment which was filed January 16, 1997. (D.C. Dk. 51). The district court initially took plaintiff's motion off-calendar as untimely filed (D.C. Dk. 57) and denied his motion to have it placed back on the court's calendar. (D.C. Dk. 59.) However, defendants filed a statement of non-opposition to plaintiff's second ex parte motion to have his motion for summary judgment placed back on the court's calendar. (D.C. Dks. 63, 60.) The court's docket does not contain a docket entry numbered 66; presumably the missing entry is the court's order placing plaintiff's motion for summary judgment back on calendar.

On July 24, 1998, the Magistrate Judge issued a report and recommendation partially granting and partially denying summary adjudication for plaintiff and for defendants and otherwise denying their motions for summary judgment. (D.C. Dk. 67.) On August 8, 1998, defendants filed objections to the report and recommendation. (D.C. Dk. 69.) On September 4, 1998, following a de novo review, the court issued an order granting and denying partial summary adjudication and denying the parties' motions for summary judgment. (D.C. Dk. 73 and 74.)

In its order entered September 8, 1998, the court granted partial summary adjudication in favor of plaintiff on the grounds that it was without substantial controversy that, inter alia, defendants have violated and are violating plaintiff's right to free exercise of his religion to the extent that they have denied him the right to be identified by his legal religious name and his committed name in prison computer records and his central prison file, to use identification and privilege cards identifying him by both names and denying him the right to receive mail, visitation, medical care, canteen services, otherwise appropriate deliveries of money or other items from

non-prisoners, and all other services and benefits to which he would otherwise be entitled in his legal, religious name and his committed name. (D.C. Dk. 73, pp. 1-2.)

The court granted partial summary adjudication in favor of defendants on the grounds that it was without substantial controversy that, inter alia, plaintiff cannot sue defendants for damages in their official capacities and former Director Gomez is not liable for damages in his individual capacity. (D.C. Dk. 73, p. 2.)

On September 11, 1998 the case was transferred from the calendar of then United States District Judge Wardlaw to the calendar of United States District Judge Paez. (D.C. Dk. 76.)

On September 17, 1998, defendants filed a motion for reconsideration. (D.C. Dk. 74.) Defendants' motion was based on two grounds. One ground was that the court's manifest failure to consider the material fact of their good faith reliance on facially valid departmental regulations. The second ground was that, due to the lengthy delay of more than a year from the briefing to the issuance of the order, recent developments in applicable case law presented a material difference in law. Cf.,

Local Rule 7.16 (a) and (c) of the United States District Court for the Central District of California. (D.C. Dk. 75.)

On October 16, 1998, the motion for reconsideration was denied. (D.C. Dk. 82.)

Proceedings in the District Court have been stayed pending this interlocutory appeal. (D.C. Dk. 93.)

C. CUSTODY AND BAIL STATUS

Plaintiff-appellee is presently confined by the California Department of Corrections at California State Prison - Los Angeles County in Lancaster, California. He is serving a sentence of life imprisonment without the possibility of parole.

D. STANDARD OF REVIEW

Cases presenting purely or predominately legal issues are reviewed de novo. Premier Communications Network v. Fuentes, 880 F.2d 1096, 1102 (9th Cir. 1989). Grants of summary judgment are reviewed de novo. Bagdadio v. Nazar, 84 F. 3d 1194, 1197 (9th Cir. 1996). Denials of qualified immunity are reviewed de novo. Baker v. Racansky, 887 F. 2d 183, 185 (9th Cir. 1989).

STATEMENT OF FACTS

Plaintiff was convicted, sentenced, and committed to the

California Department of Corrections (CDC) under the name Felton Lee Guillory on November 21, 1984. (D.C. Dk. 1, Exh. A, p. 1.)

In April, 1992, plaintiff legally changed his name to Shomari Naeem Shuaibe. (D.C. Dk. 1, Exh. B.) Plaintiff's legal name change occurred prior to the enactment of California Penal Code section 1279.5(b), which provides that, effective January 1, 1995, inmates incarcerated in CDC must secure the prior approval of the Director of Corrections before petitioning the state superior court for a name change.

Plaintiff filed an inmate grievance regarding his name change on March 10, 1994; it was denied at the third and final (Director's) level on November 18, 1994. (D.C. Dk. 1, Exh. A.)

In his complaint, plaintiff alleged that James Gomez, then Director, California Department of Corrections, violated his rights under the Religious Freedom Restoration Act, the First Amendment of the United States Constitution and California law. (D.C. Dk. 1, p. 6(c), last sentence.)

Plaintiff alleged that the other seven defendants violated his rights under the First Amendment and California law. (D.C. Dk. 1.) Plaintiff names three correctional counselors (Whyte,

Lorenzen and Felix), an associate warden (Yarborough), an acting warden (Ratelle), an appeals examiner (Bluestein), and the Chief of the Inmate Appeals (Garibay) in addition to the director. (Id.)

Plaintiff seeks declaratory and injunctive relief. (Id., p. 8.). He also seeks "prospective damage" ranging from $2 million from Director Gomez to $500,000 each from the three correctional counselors, "compensatory damage" of $50,000 from each defendant, "special damages" of $50,000 from each defendant, and $1 million for "other harm" from both Gomez and Ratelle. (Id.)

The California Department of Corrections Departmental Operations Manual (DOM) contains a provision directing Departmental staff to use an inmate's commitment name to identify that inmate throughout his term. (D.C. Dk. 50, pp. 3, 4, 74.) The manual contains provisions indicating that an inmate's other names, including legal name changes, are to be recorded as ACA's ("also committed as") or AKA's ("also known as"). On March 16, 1995, the applicable DOM section was modified to specifically provide that an inmate's legal name change would be recorded as an ACA for visiting and mail purposes. (D.C. Dk. 50, p. 42.)

Neither the earlier version nor the revision permitted substitution of an inmate's new legal name for his commitment name. (D.C. Dk. 50, p. 41.) This rule was uniform irrespective of whether the name change was religious or other personal reasons.

The Regulation and Policy Management Branch and the Legal Affairs Division of the Department are responsible for monitoring developments in the law and for incorporating them when appropriate into revisions of the Departmental Operations Manual (DOM). Departmental staff are to follow the DOM. (D.C. Dk. 50, pp. 4, 32, 37, 45 and 46.)

The discovery cut-off date was October 31, 1996. (D.C. Dk. 42.) The motion cut-off date was December 10, 1996. (D.C. Dk. 42.) The Religious Freedom Restoration Act was held unconstitutional on June 25, 1997. City of Boerne v. Flores, ___ 521 U.S. ___, 117 S. Ct. 2157, 2172, 138 L. Ed. 2nd 624 (1997).

On September 4, 1998, the District Court issued an order partially granting and partially denying summary adjudication. (D.C. Dk. 67.)

Defendants filed objections, pointing out, inter alia, that

information regarding plaintiff's religious name is, and was at all times relevant herein, contained in his inmate central file and visiting file. His religious name is listed in the Also Committed As alias tracking information in the California Department of Corrections' Offender Based Information System (OBIS). (D.C. Dk. 69, Declaration of Cruz.) There are other Department of Corrections' information management systems, most of which do not have the capacity to accept aliases. Defendants wish to advise this court that the Correctional Management Information System referenced in paragraph 3 of Wagner's declaration was not implemented and the contract was not renewed.

ARGUMENT

I

QUALIFIED IMMUNITY

Defendants are entitled to qualified immunity because they acted in good faith and relied upon existing published departmental regulations which were objectively reasonable on their face in their review of plaintiff's inmate grievance.

While they had the discretion necessary to review, hear, grant or deny plaintiff's inmate appeal, defendants Whyte,

Lorenzen, Felix, Yarborough, Ratelle, Bluestein, and Garibay did not have discretion to change the Departmental policy which was being grieved. All defendants, including former Director Gomez, reasonably assumed, and were entitled to assume, that the Departmental Operations Manual and other published regulations, policies and procedures were being revised, amended or updated as necessary to comply with applicable changes in the law.

While this Circuit appears not to have explicitly addressed the issue, the Sixth Circuit has held that officials relying on published regulations were entitled to qualified immunity. Wolfel v. Morris, 972 F. 2d 712, 719-20 (6th Cir. 1992). The Sixth Circuit held that even though courts reviewing the official's action subsequently found that their interpretation of the regulation was in error, these officials were entitled to qualified immunity. Id. This rule has found acceptance in district courts who have recognized that qualified immunity extends to prison officials who rely on a facially valid regulation. See, e.g., Depugh v. Penning, 888 F. Supp. 959, 998 (N.D. Iowa 1995); Jaeger v. Dubuque County, 880 F. Supp. 640 (N.D. Iowa 1995); and Kurtz and Ross v. Denniston and Doe, 872 F.

Supp. 631 (N.D. Iowa 1994).

The view that reliance on published regulations entitles state employees and officials to qualified immunity finds support in the United States Supreme Court's opinions in Harlow v. Fitzgerald, 457 U. S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and Mallory v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The "objective reasonableness" standard set forth in Harlow was specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Harlow, 457 U.S. at 815 - 16, 102 S. Ct. at 2736 - 37. In Mallory, the Supreme Court recognized if officers of reasonable competence could disagree on an issue, immunity should be recognized. Thus, the doctrine of qualified immunity also protects officials from liability for their reasonable efforts even if their conclusions and actions are arguably wrong. See, e.g., Moorman v. Thalacker, 83 F. 3d 970, 974 (8th Cir. 1990); Bartlett v. Fisher, 972 F. 2d 911, 914 (8th Cir. 1992); Gona v. Hanson, 880 F. 2d 95, 97-98 (8th Cir. 1989).

Here, plaintiff is a California prisoner who represented

himself in pro per during the initial years of this litigation. In the case at bench, seven defendants[1/] have been required to enter appearances, respond to discovery and file pleadings. If they are not granted qualified immunity, these state employees will be forced to stand trial in an action alleging that a policy they did not institute and could not change is, in plaintiff's eyes, unconstitutional. Plaintiff's naming of every person who was involved in the review of his inmate appeal has caused unnecessary disruption to governmental operations and created an unnecessary expense to state and federal taxpayers as well as an undue burden on the court. The Harlow reasonableness standard was designed and adopted so that insubstantial claims could be resolved on summary judgment and that these disruptions, expenses and burdens could be avoided. See, generally, Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), cited with approval in Harlow, 475 U.S. at 815-16, 102 S. Ct. at 2736-37. Defendants submit they are entitled to qualified immunity and that the court erred in denying their motion for summary judgment.

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1. A suggestion of death on the record has been filed for Victor Bluestein.

CONCLUSION

For the foregoing reasons, this Circuit should expressly hold that state employees relying on published regulations, policies and procedures which they are unable to ignore, change, modify or rescind are entitled to qualified immunity in section 1983 actions charging them with violations of federal rights because of their reliance on these regulation, policies and procedures. The district court's order denying defendants-appellants' motion for reconsideration should be reversed and the matter remanded to the district court for further proceedings in accordance with this court's order granting defendants qualified immunity.

DATED:

BILL LOCKYER, Attorney General
of the State of California
DAVID DRULINER, Acting Chief
Assistant Attorney General
MORRIS LENK, Acting Senior Assistant
Attorney General
DARRELL LEPKOWSKY, Supervising
Deputy Attorney General

By René Lucann for
JANE CATHERINE MALICH
Deputy Attorney General

Attorneys for Defendants/Appellants

STATEMENT OF RELATED CASES

This is to certify that the undersigned deputy does not know of any related cases pending before this court within the meaning of Rule 28-26, Rules of the Ninth Circuit Court of Appeals.

DATED:

BILL LOCKYER, Attorney General
of the State of California
DAVID DRULINER, Acting Chief
Assistant Attorney General
MORRIS LENK, Acting Senior Assistant
Attorney General
DARRELL LEPKOWSKY, Supervising
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By René Lucasin for
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Deputy Attorney General

Attorneys for Defendants/Appellants

STATEMENT OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, I certify that the opening brief is monospaced, has 10.5 or less characters per inch and contains 2,536 words or 342 lines or 342 lines of text.

DATED:

BILL LOCKYER, Attorney General
of the State of California
DAVID DRULINER, Acting Chief
Assistant Attorney General
MORRIS LENK, Acting Senior Assistant
Attorney General
DARRELL LEPKOWSKY, Supervising
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By Rene Lucani for
JANE CATHERINE MALICH
Deputy Attorney General

Attorneys for Defendants/Appellants

DECLARATION OF SERVICE

Case Name: **SHUAIBE, aka GUILLORY v. GOMEZ, et al.**
Case No.: **CV 95-1764 RAP (Mc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 3, 1999, I placed the attached

DEFENDANTS-APPELLANTS' BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Catherine Swysen
Sanger & Swysen
233 East Carrillo Street, Suite C
Santa Barbara, CA 93101

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 3, 1999 at Los Angeles, California.

Declarant **GIL CARREON**

No. 99-1896

In The
Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners
v.
SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Plaintiff, v. JAMES GOMEZ, Director of Corrections; et al., Defendants.	Case No.: CV 95-1764 AWT (Mc) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS AND EXHIBITS DATE: JANUARY 21, 1997 TIME: 9:30 AM PLACE: COURTROOM OF MAGISTRATE JUDGE McMAHON

(Defendants' receipt of the signed original declarations of Yarborough and Garibay has been delayed due to illness and a delay in overnight mail. Defendants will file the signed originals upon receipt. They are submitting the facsimile signature of Yarborough and, as an exhibit to the Malich Declaration, the approved declaration of Garibay.)

assets. See, Complaint, Exhibit D.

VII

DEFENDANTS CANNOT BE LIABLE UNDER RESPONDEAT SUPERIOR

Supervisory personnel are not generally liable under the Civil Rights Act for the actions of their subordinates under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between them and the claimed constitutional violation must be specifically alleged. See, Fayle v. Strapley, 607 F.2d 858 at 862 (9th Cir. 1979); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982).

Director Gomez and the other defendants cannot be held liable for the acts of their subordinates under a theory of respondeat superior. Milton v. Nelson, 527 F.2d 1158, 1159 (9th Cir. 1975). The failure to establish a nexus with any alleged impropriety set forth in Plaintiff's complaint compels a summary judgment for defendants.

VIII

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Defendants submit that assuming arguendo any violation of plaintiff's rights occurred whatsoever, they are entitled to qualified immunity.

Under the rule set forth in Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), a governmental official performing discretionary functions is shielded from liability for civil damages insofar as his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Ibid. The purpose of the rule is to permit such officials

to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. Id., at 819; Kraus v. County of Pierce, 793 F.2d 1105, 1108 (9th Cir. 1986).

The Harlow test is an objective one. Harlow v. Fitzgerald, 457 U.S. at 818; Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985). The reasonableness of an official's conduct is measured by reference to clearly established law at the time of the acts at issue. Harlow v. Fitzgerald, 457 U.S. at 818; Lowe v. City of Monrovia, 775 F.2d at 1011. In determining whether the applicable law was clearly established, the court looks to decisions of the United States Supreme Court first and then to decisions within the circuit where the case arose. See Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). In the absence of binding precedent, the court looks to whatever decisional law is available. Ibid. If the official's action was reasonable, even if mistaken, then Harlow immunity applies, and an action for damages must be dismissed. Guerra v. Sutton, 783 F.2d 1371, 1374 (9th Cir. 1986).

Further, the contours of the "clearly established" right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). A reasonable person standard adheres at all times. Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986).

The qualified immunity test requires the court engage in the following steps. First, the specific right or rights allegedly

violated must be identified. Second, a determination of whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters. Third, the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991).

In this case, plaintiff wants to use his new religious name exclusively on all prison documents and records, as well as correspondence. There is no clearly established right to do so under Malik I, II, and III. Defendants submit that the Malik triology can be read to permitted the use of a religious name on outgoing correspondence in addition to the inmate's committed name but that a more extensive reading of these cases is not supported. Because plaintiff wanted relief which was not mandated by the Constitution, defendants are entitled to qualified immunity.

Assuming arguendo that plaintiff's complaint can be construed as asserting a right to use both names, defendants assert that they are still entitled to qualified immunity under the second and third prongs of the Romero test.

Respecting the second prong, defendants assert that the right was not clearly established enough to alert a reasonable officer or administrator to its parameters. While the Ninth Circuit denied Washington state officials qualified immunity in Malik II on the grounds that the law was clearly established that an inmate had the right to use his committed and new legal religious name on outgoing mail, defendants submit that the law was not clearly established and there was, in fact, a division between the circuits, particularly in light of Malik I's overbreadth and

dicta that inmate entitled to use his name on "correspondence and other documents." See, e.g., Akbar v. Canney, 634 F.2d 339 (6th Cir. 1980), cert. denied, 450 U.S. 1002 (1981)(holding that prison officials do not have to change all their records to reflect the newly adopted name of a prisoner who has converted to Islam; prisoners do not have a constitutional right to dictate how prison officials keep their prison records); Azeez v. Fairman, 795 F.2d 1296 (7th Cir. 1986) (law not clearly established); Muhammad v. Wainwright, 839 F. 2d 1422 (11th Cir. 1987)(prisoner who legally changed his name for religious reason could be disciplined for refusing to respond to his committed name during roll call); Salahuddin v. Coughlin, 591 F. Supp. 353 (S.D.N.Y. 1984) (prison officials not required to recognize informal adoption of religious names), rev'd on other grounds, 782 F.2d 1127 (2d Cir. 1986); Rahman v. Stephenson, 626 F. Supp. 886 (W.D. Tenn. 1986) (same).

The third factor considered under Romero is whether a reasonable officer could have believed lawful the particular conduct at issue. Defendants maintain that a reasonable person would have believed that following DOM did not violate plaintiff's clearly established rights. Plaintiff did not cite United States Supreme Court or Ninth Circuit authority supporting his claim that he was entitled to have his religious name substituted for his commitment name everywhere it could possibly be used in prison. Defendants submit that a reasonable officer or administrator would have believed that following DOM was lawful. Qualified immunity extends to a prison official who relies on a facially valid regulation. Kurtz and Ross v. Denniston and Doe, 872 F. Supp. 631 (N.D. Iowa 1994), citing Wolfel v. Morris, 972 F. 2d 712, 719 - 20

(6th Cir. 1992) (holding at 719 that officials relying on published regulation were entitled to qualified immunity even though courts reviewing their action subsequently found that their interpretation of the regulation was in error). Qualified immunity also protects officials from liability for their reasonable efforts even if their conclusions and actions are arguably wrong. Mallory v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 27 (1986); Moorman v. Thalacker, 83 F. 3d 970, 974 (8th Cir. 1990); Bartlett v. Fisher, 972 F. 2d 911, 914 (8th Cir. 1992); Gona v. Hanson, 880 F. 2d 95, 97-98 (8th Cir. 1989).

Moreover, government officials are not required to predict the future course of constitutional law. Lum v. Jensen, 76 F.2d 1385, 1388 (9th Cir. 1989) (citing cases).

For these reasons, defendants submit that they are entitled to qualified immunity.

VI

SINCE NONE OF PLAINTIFF'S FEDERAL CLAIMS SURVIVE THE INSTANT MOTION, THIS COURT SHOULD DECLINE TO EXERCISE ITS SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE CLAIMS

Plaintiff alleges that defendants have violated his rights under Article 1, section 1 and Article 1, section 4 of the Constitution of the State of California.

Defendants are once again hampered by the conclusory nature of plaintiff's pleading from being certain which of the various inalienable rights guaranteed under Article 1, Section 1 of the California Constitution plaintiff believes was violated.[8]

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8. Article 1, section 4 of the California Constitution guarantees free exercise of religion, among other provisions.